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January 27, 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Praveen Goyal, Esq.
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

RE: Petition for Reconsideration in CC Dkt. No. 96-45 filed by the Washington State Department of Information Services (regarding participation by schools and libraries eligible for universal service support in buying consortia that include private colleges)

Dear Mr. Goyal:

This letter follows our meetings of January 5 and 12, 2000, in regard to the above captioned matter. It is intended to provide you with additional information regarding 1) legal precedents for the relief sought by the Washington State Department of Information Services ("DIS"), as expressed in DIS's previous submissions and reiterated in our oral ex parte presentations, 2) DIS's request for alternative relief in the form of a waiver, and 3) the benefits and/or detriments to section 254-eligible institutions that would result from the grant or denial of the relief requested.

1. Legal precedents: In creating section 54.501(d)(1) of the Commission's rules, 47 C.F.R. §54.501(d)(1) (the rule at issue in DIS's Petition for Reconsideration ("Petition")), the Commission invoked its authority under section 201(b) of the Communications Act, as amended, 47 U.S.C. §201(b), to designate "a class of communications eligible for different rates, notwithstanding the non-discrimination requirements of section 202(a)."¹ The class so designated consisted of "communications to organizations, such as schools and libraries and eligible health care providers, eligible for preferential rates under

¹ Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd. 8776, rel. May 8, 1997 (hereinafter *First Report and Order*), at ¶ 483.

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section 254 [of the 1996 Telecommunications Act]."² The Commission combined this class of entities with "governmental entities" (a class specifically identified in section 201(b) as eligible to receive different rates) to identify the kinds of consortia to which Incumbent Local Exchange Carriers ("ILECs") would be able to offer interstate services in competitive bidding situations at less than their generally tariffed rates. Consortia that do not fit this description (by virtue of the fact that they contain ineligible private sector entities) must purchase their interstate services from ILECs at generally tariffed rates, or the section 254 eligible schools and libraries that belong to such consortia will not be able to use their universal service discounts.

DIS has asked the Commission to exercise the same 201(b) authority that it invoked when it originally established section 51.504(d)(1), to make it possible for approximately fifteen private, non-profit, baccalaureate institutions located in the State of Washington to join a specialized state educational network that passes some 440 locations, approximately 300 of which are "section 254 eligible" K-12 schools and the remainder of which are "section 254 ineligible" public ("governmental") schools.

The Commission's power under section 201(b) to decide whether classifications not explicitly enumerated in the statute are "just and reasonable" is very broad and has long been recognized.³ It is usually invoked in response to a formal complaint,⁴ and together with section 202(a) forms the "backbone" of consumer protection against discrimination by carriers.⁵

² *Id.*

³ *RCA Communications v. United States*, 43 F. Supp. 851 (S.D.N.Y. 1942) (upholding the Commission's classification of "urgent" services and prescription of a just and reasonable ratio of "urgent" to "ordinary" charges).

⁴ See Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forebearance For Broadband Personal Communications Services, *Memorandum Opinion And Order And Notice Of Proposed Rulemaking*, 13 FCC Rcd 16857, at ¶ 16 (rel. Jul. 2, 1998), hereinafter *PCIA Petition for Forebearance*.

⁵ *PCIA Petition for Forebearance* at ¶¶ 14-17. The interplay between section 202(a) and 201(b) was also explored in *AT&T Communications, Inc.; Revisions to Tariff F.C.C. No. 16, Memorandum Opinion And Order*, 67 RR 2d 496, 5 FCC Rcd. 700 (rel. Jan. 30, 1990) (hereinafter *AT&T Tariff No. 16*). *AT&T Tariff No. 16* was the case cited in the Universal Service First Report and Order in the section discussing the limitation on consortia. In *AT&T Tariff No. 16*, the Commission found that "Section 201(b) creates an exception to the general prohibition in Section 202(a)" but that "Section 201(b) does not . . . except from the requirements of Section 202(a) the services provided pursuant to the government service

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It is therefore not a "creative" power, but a *decisional* one (*i.e.*, the Commission does not "create" classifications that are presumptively non-discriminatory, but rather *decides* whether the "charges, practices, classifications or regulations"⁶ that a carrier has utilized or will utilize are "just and reasonable").⁷

Thus, of some 3,000 instances when the Commission's authority under section 201(b) has been invoked or challenged, there are very few instances in which the Commission has, in a proactive manner, declared a class of communication to be one for which different rates may apply, as it did in the schools and libraries provisions of the Universal Service First Report and Order.⁸ Far more typical is the recitation of the language in a complaint charging a carrier with an unreasonable charge, practice, classification or regulation in violation of section 201(b), followed by a (usually) routine disposition of the case.

Continued from previous page

classification. Thus, Section 202(a) prohibits a carrier from discriminating unreasonably among customers of the service provided under the government service classification."

⁶ 47 U.S.C. §201(b).

⁷ *Cellnet Communications, Inc. v. FCC*, 12 CR 1191 (CA 6, 1998) (noting that "The justness and reasonableness requirements set out in §§201 and 202 remain the criteria for FCC action.").

⁸ The Commission has occasionally exercised its power under section 201(b) on its own motion. *See, e.g.*, the *Telpak* cases, which sought to determine the lawfulness of AT&T's offering of different rates for different amounts of capacity for the same private line services. A summary of the *Telpak* proceeding is given in *American Tel. and Telegraph Co. v. F.C.C.*, 449 F.2d 439 (CA 2nd Cir. 1971). *See also* the Resale and Shared Use Decision, *Order*, 60 FCC 2d at 282-84, in which "the Commission held that provisions in carrier tariffs which had the effect of precluding the resale of private line service were unlawful. The Commission found that tariff provisions restricting resale were "unjust and unreasonable" in violation of Section 201(b) of the Communications Act. The Commission also concluded that such restrictions were "unlawfully discriminatory" under Section 202(a) of the Act because they would "effectively foreclose a certain class of potential subscribers from obtaining carrier services and facilities." In *Resale of Switched Services*, the Commission adopted a blanket prohibition on tariff provisions restricting the resale of common carrier domestic public switched network services, finding such restrictions to be unlawful under Sections 201(b) and 202(a) of the Act. For switched services, the Commission also found that an unrestricted resale policy would produce benefits similar to those set forth in the Resale and Shared Use Decision." *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, Second Notice Of Proposed Rule Making*, 10 FCC Rcd 10666 (rel. Apr. 20, 1995), at ¶ 60 (internal citations omitted). *See also* Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 83 FCC 2d 167, 193 (1980) (Resale of Switched Services), recon. denied, 86 FCC 2d 820 (1981).

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US West Communications Tariff F.C.C. No. 39 is fairly typical. In *US West Communications Tariff F.C.C. No. 3*, MCI challenged US West's proposal to provide its Federal Government Telecommunications Service to "to the agencies of the Federal Government, and any Interexchange Carrier (IXC) serving such agencies" on the grounds that private entities (the IXC's) would be able to receive preferential rates under section 201(b)'s "government" classification. The Commission dismissed the complaint without analysis, using only the formula employed to dismiss many other complaints in the late 1980s: "The Common Carrier Bureau has reviewed the tariff revisions and the pleadings. We conclude that no compelling argument has been presented that the proposed tariff revisions are patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time."¹⁰

The courts have upheld the FCC's authority under section 201(b) to make rules and regulations pertaining to matters under the Telecommunications Act of 1996.¹¹ The Commission has already found, through its Universal Service proceeding, Congressional support for a regulatory scheme that permits eligible schools and libraries to form and participate in consortia with both eligible and ineligible entities.¹² While the Commission had good reasons (and specific statutory authority) for limiting membership in unrestricted consortia to statutorily identified classes (governmental entities and entities eligible for universal service support under section 254), it was not statutorily precluded from "deciding" -- for other good reasons -- that entities other than those named in the present rule could participate in unrestricted consortia. In fact, the history of the Commission's use of its authority under section 201(b), spanning some 3,000 cases, suggests just the opposite: that section 201(b) itself statutorily *empowers* the Commission to make just such a determination.

⁹ US West Communications Tariff F.C.C. No. 3, *Order*, 5 FCC Rcd 14, rel. Dec. 6, 1989.

¹⁰ *Id.* at ¶4. See also AT&T Communications Revisions to Tariff F.C.C. No. 16, *Order*, 6 FCC Rcd 5187 (rel. Aug. 30, 1991) (similar case employing similar language dismissing MCI's petition to reject a tariff filed by AT&T on grounds that a government offering could potentially be used to extend government discounts to non-government entities).

¹¹ *AT&T Corp. v. Iowa Util. Bd.*, 119 S.Ct. 721, 730 (1999) (holding "that [section] 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies.").

¹² *First Report and Order* at ¶ 477.

DIS has suggested a narrowly-tailored change to the Commission's rule. The proposed change would not open the floodgates for requests for similar changes because the proposed change would only apply to private, non-profit, baccalaureate institutions -- a class of institution already eligible for federal support for educational purposes under other (non-telecom) statutory provisions.¹³ Nor would it provide a "loophole" through which carriers or other private-sector entities could circumvent the Commission's longstanding policies of non-discriminatory pricing.¹⁴

2) DIS's request for alternative relief in the form of a waiver: Generally, the Commission's rules may be waived for good cause shown.¹⁵ DIS has shown through its pleadings, through letters from state and federal legislators, and through meetings with

¹³ See e.g. 20 U.S.C. §§ 1001(a)(4) and (b)(2) (defining "institution of higher education" as a "public or other nonprofit institution" for purposes of participation in federally-funded educational programs).

¹⁴ See *Southwestern Bell Telephone Company*; Tariff F.C.C. No. 73, *Memorandum Opinion And Order On Reconsideration*, 13 FCC Rcd 6964 (rel. Mar. 13, 1998). The underlying Order rejected a Southwestern Bell tariff which contained a provision that would have permitted the company to respond to Requests For Proposals ("RFPs") with individualized contract offerings. In its Petition for Reconsideration, Southwestern argued that the Commission had to allow the company to establish customer-specific tariffs because the May 8, 1997 Universal Service Order permitted carriers to respond with below tariff rates to customer RFPs from schools, libraries, and rural health care providers. The Commission rejected that argument, finding that the customer-specific rates in Southwestern's tariff filing were not at all like the rates permitted under the Universal Service Order. The MO&O on Reconsideration states, at ¶9:

Rather, the Commission invoked its explicit authority under section 201(b) of the Communications Act to identify a special class of communications for which different charges may be made Such preferential rates are not to be offered on a customer-specific basis, but rather "will be generally available to all members of these classes under tariffs filed with this Commission." Therefore, the Universal Service Order provides no support for [Southwestern Bell's] argument.

¹⁵ 47 C.F.R. § 1.3.

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Commission staff that it has cleared the "high hurdle" that confronts every applicant for a waiver.¹⁶

The Commission may exercise its discretion to grant a waiver "where the particular facts make strict compliance inconsistent with the public interest."¹⁷ In determining whether to exercise its discretion, the Commission may take into account "hardship, equity, and more effective implementation of overall policy on an individual basis."¹⁸ "Waiver is appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than strict adherence to the general rule."¹⁹ "The test is whether the applicant has *shown* such special circumstances . . ."²⁰ Additionally, with respect to the present request, the Commission "must consider carefully the consequences of making exceptions to rules designed to provide predictability"²¹ and therefore "must take into account the impact on universal service if other[s] requested similar relief . . ."²²

The Commission has determined that the aggregation of eligible schools and libraries with other eligible and certain ineligible entities for the purpose of securing the lowest possible pre-discount prices for eligible services is in the public interest. The Commission has also determined that ineligible entities with which eligible schools and libraries may aggregate for this purpose include "the large state networks upon which many eligible schools and libraries depend for their telecommunications needs." To the best of our knowledge, Washington State's situation is unique in that its "K-20 network," a legal entity separate from the state telecommunications network, was legislatively established to serve the needs of all of the state's educational institutions. The K-20 network is designed to provide integrated services

¹⁶ *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (*WAIT Radio*).

¹⁷ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (hereinafter *Northeast Cellular*).

¹⁸ *WAIT Radio*, at 1157.

¹⁹ *Northeast Cellular*, at 1166.

²⁰ *Federal-State Joint Board on Universal Service*, Memorandum Opinion and Order, CC Dkt. No. 96-45, DA 98-2333, ¶ 12 (rel. Nov. 18, 1998) (emphasis added).

²¹ *Id.* at ¶15.

²² *Id.*

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to -- and integrate the educational resources of -- approximately 440 locations across the state, of which approximately 298 locations are the sites of schools that are eligible for universal service support, while approximately 127 are public institutions of higher education. If the requested relief is granted, approximately 15 locations would be used by private non-profit baccalaureate institutions. The strict application of the rule regarding the composition of consortia would mean that 298 schools and libraries would have to receive pre-discount rates for interstate ILEC services at generally-tariffed rates if 15 of the 440 total number of locations on the network were private, non-profit baccalaureate institutions. This result would countermand, for the entire State of Washington, the Commission's finding that eligible schools and libraries should receive the lowest possible pre-discount rates for eligible services. Thus, the strict application of the rule in the case of Washington State would be inconsistent with the public interest.

Strict application of the rule would also create undue hardship on, or inequities for, the State of Washington, the 15 educational institutions in question, and the eligible entities already connected to the network. The State of Washington has already spent nearly \$55 million on Phases I and II of its three-Phase state-of-the-art educational facility. Because the K-20 network is an integrated system that was designed to accommodate all of the State's educational needs, strict application of the rule would mean that the State would have to exclude from the integrated services that the rest of the State's educational institutions are utilizing the schools that produce one-quarter of its K-12 teachers.

This outcome imposes undue hardship on the State by frustrating the public interest purpose that moved the State of Washington to create the network in the first place. Not only would a significant portion of Washington's future teachers be excluded from access to the integrated resources that the rest of the state's students and future educators enjoy, but those students and future educators also would be denied access to the significant educational resources that those private colleges would contribute to the network (see discussion *infra*).

Strict application of the rule would also result in great hardship to the 15 schools in question, many of which are already struggling financially and serve rural areas of the state. If they are unable to participate in the single, integrated services network established by the state, they will have to make their own arrangements to provide only such services as they can afford, or such as are available in rural areas. In a very real sense, strict application of the rule, which applies only to the interstate services of ILECs, would leave the colleges in question "on their own" for *all services* by virtue of their not being able to participate in the network where *all services* are available.

For the eligible K-12 entities already connected to the network, the exclusion of the colleges in question would create undue hardship or inequities through the eventual

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degradation in quality of one quarter of the state's future K-12 teachers and the deprivation of access to the resources of the excluded colleges.

Finally, the waiver sought would facilitate a more effective implementation of overall policy on an individual basis. The Commission's overall policy with respect to universal service and consortia is to encourage eligible entities to form and participate in buying consortia comprised of the widest number of members. The Commission's restriction on participation in consortia by private entities grew out of concern for the broader non-discriminatory pricing policies, and sought to "deter ineligible, private entities [identified as large firms and commercial banks²³] from entering into aggregated purchase arrangements . . . to receive below-tariff or below-market rates that they otherwise would not be entitled to receive."²⁴ The purpose for the inclusion of private, non-profit baccalaureate institutions in the present aggregation is not to obtain an otherwise unpermitted advantage over competitors by gaining access to a relatively small number of services at below-tariffed rates (many of the services provided by the K-20 network are intrastate and thus outside the scope of the rule), but to provide integrated access to *all* services for *all* of the educational institutions within the State of Washington. Exercise of the Commission's discretion to grant a waiver would more effectively implement, in the State of Washington, the Commission's policy of encouraging the formation of broad educational consortia, without disrupting its policies with respect to non-discriminatory pricing.

DIS has shown that the special circumstances of the formation and role of the K-20 network in the State of Washington, as well as the specific nature of the schools in question and the limited scope of DIS's request warrant a deviation from the general rule. As just discussed, such deviation would better serve the public interest than strict adherence to the general rule. With respect to the implications for universal service if other states should request similar waivers, we believe that the narrowly-tailored nature of DIS's request (*i.e.*, that only private, non-profit baccalaureate institutions should be able to join a state-sponsored educational network with eligible schools and public colleges and universities) will make it highly unlikely that similar requests will be made. In the unlikely event that several additional states make a similar request, the additional requests would constitute evidentiary support for a finding that a

²³ *First Report and Order* at ¶477.

²⁴ Changes to the Board of Directors of the National Exchange Carrier Association; Federal-State Joint Board on Universal Service, *Sixth Order on Reconsideration in CC Docket No. 97-21*; *Fifteenth Order on Reconsideration in CC Docket No. 96-435*, 1999 FCC Lexis 5517 (rel Nov. 1, 1999) at ¶ 54.

rule change is required, and could be consolidated in a future proceeding to effect the narrowly-tailored rule change that DIS originally requested. Therefore, the impact on universal service if others requested similar relief would only be to improve the regulatory scheme by further encouraging or facilitating the formation of educational consortia.

3) The benefits and detriments to section 254-eligible institutions from the granting or withholding of the relief requested: In the preceding sections, we have referred to the fact that the schools in question produce approximately one-quarter of Washington's K-12 teachers. Here is some more specific statistical detail in support of that statement.

The 15 schools in question:

- grant 28% of the four-year degrees that lead to a teaching certificate (*e.g.*, biology with an educational emphasis);
- grant 66% of the masters degrees in education;
- graduate students who account for 1/3 of the first-time-issued teaching certificates in the state, and
- offer many of the professional development courses that teachers are required to take to maintain their teaching certificates in the State of Washington.

These schools are therefore essential to the overall quality of K-12 education in the State of Washington. The K-20 network is already changing the way that educational training is delivered throughout the state, especially in rural areas. (Washington is 2/3 rural, and the K-20 network goes to all areas of the State – even to those areas that are poorly served by the local exchange carriers.)

The network will also open up many opportunities for interaction between K-12 students and higher educational institutions. What follows is a listing of just a few of the opportunities for interaction of which Washington's K-12 students will be deprived if the 15 schools in question are not permitted to join the network:

- **Study Abroad** – Most of these colleges have very thorough study abroad programs. Students are placed all over the world, and could use the K-20 network from abroad to interact with K-12 students in Washington who are studying other cultures and languages.
- **Foreign Language** – These schools have a wealth of foreign language offerings, and could teach less common languages over the network to K-12 schools. In addition to Native American languages, these schools currently offer instruction in such other languages as Norwegian, Chinese, Latin, Greek, and Sign Language.

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- **Science** – Collectively, the colleges have three observatories and a planetarium, which could provide many opportunities for interaction with students from the earliest grades through high school.
- **Archaeology** -- One of these colleges is already developing a course for gifted middle school students on archaeology in conjunction with an archaeological site in Israel; this course would likely be made available over the educational network.
- **Art/Museum Collections** – One college has one of the best Northwest art collections in the state, which could be made available on-line. Another has excellent collections on Scandinavian Immigrants, the Nisqually Plains History and the Holocaust, which are currently being placed on line. Another school has a natural history museum whose primary goal is to provide an excellent collection of specimens to be used for educational purposes. The museum includes a database of the entire mammal, bird, and reptile collections that the museum owns, available on-line. Connection to the K-20 network could greatly expand the opportunities for classroom interactivity, allowing these collections to be more fully integrated into the K-12 curriculum.
- **Engineering** – Engineering students from these colleges win top awards in state, regional and national competitions. The engineering students would be a valuable resource for high school science students and teachers.
- **Cultural diversity** – Washington's private baccalaureate colleges have a long history of integrating cultures by emphasizing knowledge as the glue that holds our society together. These schools are living experiments in cultural diversity, with a well-developed ability for explaining and linking cultures.
- **Music** – One of these schools is the top music college in the state and boasts the top college jazz band in the country. Its musicians routinely play with the top jazz artists in the nation. These musicians could provide invaluable mentoring for K-12 students through participation on the K-20 network. Another college has one of the best pipe organs in the Pacific Northwest. An interactive tour of the organ and lessons on the technology that makes it work could link music and science for K-12 students.
- **Debate** -- These colleges consistently win top debate honors in national competitions. The network could provide a direct link between these top students and high school debate teams.

These are examples of some of the ways in which the 298 section 254-eligible schools and libraries could benefit by allowing a handful of private colleges to join the K-20 network. As we have shown above, those same eligible entities would be harmed by not

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 27, 2000

VIA HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
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Re: ***Ex Parte* Presentation**

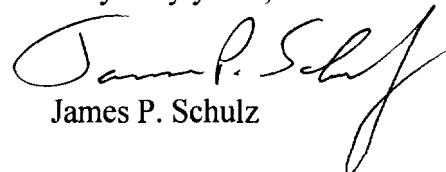
Petition for Reconsideration in CC Dkt. No. 96-45 filed by the Washington State Department of Information Services regarding participation by schools and libraries eligible for universal service support in buying consortia that include private colleges

Dear Ms. Salas:

Pursuant to 47 C.F.R. § 1.1206, we are enclosing an original and one copy of a written *ex parte* presentation to Praveen Goyal, Attorney Advisor to the Common Carrier Bureau, regarding the above-captioned matter. Please date-stamp the copy provided and return it to the messenger for return delivery to us.

Should there be any questions regarding this matter, please do not hesitate to contact the undersigned at 202-414-9276.

Very truly yours,


James P. Schulz

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Enclosure

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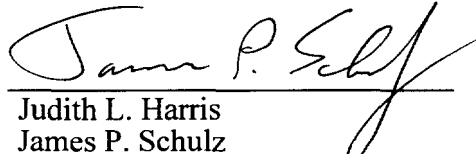
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granting the relief DIS is seeking. Not only would the eligible entities be deprived of educational opportunities immediately, but because of a) the rural situation of many of these schools, b) the lack of comprehensive service offerings in many rural areas of the state, and c) the fact that the rest of Washington's educational institutions will be sharing a fully-integrated network, the eligible entities will be harmed over time by the gradual reduction in the quality of education for one quarter of the state's K-12 teachers.

I trust that this information is responsive to your concerns. If you have any questions or would like further information, please let me know.

Respectfully submitted,

**STATE OF WASHINGTON
DEPARTMENT OF INFORMATION
SERVICES**

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